IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AMERICAN EQUITY INSURANCE COMPANY,

Plaintiff,

v. // CIVIL ACTION NO. 1:01CV137
(Judge Keeley)

LIGNETICS, INC.;
LIGNETICS OF WEST VIRGINIA, INC.;
LIGNETICS OF IDAHO, INC.;
JOHN PERSINGER; JACKY PERSINGER;
SUSAN PERSINGER; and LeROY BOGGESS,

Defendants,

and

LIGNETICS, INC.; LIGNETICS OF WEST VIRGINIA, INC.

Third-Party Plaintiffs,

v.

GARY CONKEY; TOM HAYES; and UNITED AGENCIES, INC.

Third-Party Defendants.

ORDER

This matter comes before the Court on the motions for summary judgment of plaintiff American Equity Insurance Company; defendants Lignetics, Inc., Lignetics of West Virginia, Inc., and Lignetics of Idaho, Inc.; and third-party defendants United Agencies, Inc., Gary Conkey and Tom Hayes. American Equity Insurance Company's motion to sever and stay the third-party complaint is also before the

Court. For the reasons that follow, the Court **DENIES** the parties' motions, except American Equity's motion for summary judgment, which it **GRANTS IN PART.**

I.

PROCEDURAL HISTORY

The plaintiff, American Equity Insurance Company ("American Equity"), initiated this civil action on September 13, 2001. Pursuant to 28 U.S.C. §§ 2201, *et seq.*, and W. Va. Code §§ 55-13-1, *et seq.*, its seeks a declaratory judgment that it has no duty to defend or indemnify defendants Lignetics, Inc., Lignetics of West Virginia, Inc., or Lignetics of Idaho, Inc. (collectively, "Lignetics"), in connection with any and all claims asserted by John Persinger, Jacky Persinger, Susan Persinger (collectively, the "Persingers") and LeRoy Boggess, resulting from a March 11, 2001 accident at the Lignetics facility in Glenville, West Virginia. John Persinger ("Persinger") and LeRoy Boggess ("Boggess") were severely injured in the accident, which occurred in the course of their employment with Lignetics.[1]

[1] Although the Persingers and Boggess had not filed suit in state court at the time American Equity filed the present action, American Equity filed a second amended complaint on May 16, 2003 to which it attached copies of complaints filed by the Persingers and Boggess in the Circuit Court of Brooke County, West Virginia. In general, the plaintiffs' complaints seek relief pursuant to W. Va. Code § 23-4-2(c)(2) (the "deliberate intention" statute) and various theories of negligence.

ORDER

On May 6, 2002, defendant Lignetics filed a third-party complaint seeking a declaratory judgment that American Equity and third-party defendants Gary Conkey, Tom Hayes, and United Agencies, Inc. (collectively, "United Agencies") have a duty to defend and indemnify it in connection with any and all claims asserted by the Persingers or Boggess as a result of the March 11, 2001 accident. Lignetics filed an amended third-party complaint on June 23, 2003 in which it added a counterclaim against American Equity, alleging that it breached its duty to provide coverage for the claims of the Persingers and Boggess.

On December 2, 2002, the Persingers, United Agencies, and American Equity filed cross-motions for summary judgment. American Equity also filed a motion to sever and stay Lignetics' third-party complaint.

In support of its motion to sever and stay, American Equity explains that Lignetics' "third-party complaint against the insurance agents United Agencies, Conkey and Hayes includes a claim for costs of defense and indemnification in the underlying actions in the event that the court determines that American Equity ... is under no duty to defend the underlying actions." American Equity argues that this issue is not ripe for determination because the

underyling actions are in the early stages of development and, as a result, the third-party complaint should be severed and stayed.

The basis for American Equity's motion is a legal question involving the rights and duties of Lignetics and United Agencies, not American Equity. Furthermore, this legal issue is independent of the facts as they may be developed in the underyling actions. Finally, American Equity filed its motion on the morning of oral argument--after the parties had briefed their cross-motions for summary judgment. Staying the third-party complaint would delay a ruling on United Agencies' fully-briefed motion for summary judgment. For all these reasons, the Court **DENIES** American Equity's motion to sever and stay. Consequently, the Court moves on to a discussion of the issues presented by the parties' motions for summary judgment.

II.

FACTUAL BACKGROUND

Lignetics, Inc. is a California corporation that manufactures wood pellets for wood-burning stoves. The company opened a plant in Glenville, West Virginia in 1997, and also operates or has operated facilities in Idaho and Missouri.

When Lignetics opened its West Virginia facility, it asked United Agencies to obtain insurance coverage for it. At the time,

United Agencies had procured insurance policies for Lignetics for nine years. United Agencies did not issue policies directly to Lignetics, but rather served as an intermediary between Lignetics and its insurers. During the annual renewal of its policies, Lignetics worked with United Agencies rather than with the insurers who issued the policies.

During this renewal process, Lignetics claims it told United Agencies that it was relying on United Agencies to provide it with "all possible coverages for all possible contingencies." Lignetics admits, however, that it did not read its insurance policies and was unaware of what exclusions they included.

When determining what insurance Lignetics needed for its new operations, United Agencies recognized that, in West Virginia, Lignetics faced possible exposure to "employers' liability" suits, and that it would need to be insured against such claims brought by employees injured in the workplace. To cover this type of exposure, a business can either purchase "'stop-gap' employers' liability insurance" from an insurance company, or it can purchase "excess" workers' compensation insurance from the workers' compensation fund in each state where it operates. Despite recognizing Lignetics' exposure, United Agencies did not recommend that Lignetics purchase either "stop-gap" or "excess" workers'

compensation insurance. According to United Agencies, it mistakenly assumed that Lignetics, which purchased its own workers' compensation insurance at its other plants, had purchased the necessary "excess" insurance to cover this gap in its coverage in West Virginia.

In the fall of 2000, at the request of a key customer, Lignetics asked United Agencies to procure a different classification of insurance coverage. In response, United Agencies contacted American Equity, a surplus lines carrier, through an intermediary, Western Security Surplus, a surplus lines broker.[2] American Equity subsequently issued a general commercial liability insurance policy to Lignetics. Although Lignetics paid for the policy on February 23, 2001, it did not receive the actual policy of insurance until May 10, 2001--two months after the accident at its West Virginia facility.

Although this was the first time American Equity had insured Lignetics, its policy was similar to previous policies procured by United Agencies for Lignetics and, like the other policies,

[2] "Surplus lines" or "excess lines" insurance is "specialized property or liability coverage provided by a nonadmitted insurer in instances where it is unavailable from insurers licensed by the state." *Hallas v. Boehmke and Dobosz, Inc.*, 686 A.2d 491, 494 n.6 (Conn. 1997) (quoting *Barron's Business Guide, Dictionary of Insurance Terms* (3d ed. 1995)); *see generally* W. Va. Code § 33-12C (regulating the placement of insurance with excess lines insurers).

included an exclusion for employers' liability.[3] American Equity asserts that, based on this exclusion, it has no duty to defend or indemnify Lignetics against any claims asserted by the Persingers or Boggess for injuries suffered as a result of the March 11, 2001 accident at the Lignetics facility.

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[3] Set forth below is the employers' liability exclusion contained in the commercial general liability policy American Equity issued to Lignetics:

2. Exclusions

This insurance does not apply to:

....

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:
(a) Employment by the insured; or
(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

III.

STANDARD OF LAW

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. *Id.* at 255.

The moving party has the burden of initially showing the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970). Once the moving party has met its initial burden, the burden shifts to the nonmoving party to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To discharge this burden, the nonmoving party cannot rely

on its pleadings but instead must have evidence showing that there is a genuine issue for trial. *Id.* at 324.

IV.

DISCUSSION

A.

Questions Presented

The parties' motions for summary judgment present a number of questions:

1. Under the doctrine of reasonable expectations, is American Equity, as a matter or law, obligated to insure Lignetics against any claims asserted by the Persingers or Boggess?

2. Does the doctrine of reasonable expectations apply to the present case if the employers' liability exclusion contained in the American Equity insurance policy clearly and unambiguously excludes coverage for Persinger's and Boggess' injuries?

3. If the reasonable expectation doctrine does apply, was Lignetics unreasonable in believing that it was insured for this type of accident?

4. Did United Agencies have an oral or implied insurance contract with Lignetics that covered the Persingers' and Boggess' injuries?

5. In its dealings with Lignetics, was United Agencies an agent of American Equity?

B.

The Doctrine of Reasonable Expectations

United Agencies and American Equity argue that the doctrine of reasonable expectations is inapplicable to the present case because the employers' liability exclusion in the insurance contract is clear and unambiguous. The Persingers and Lignetics, on the other hand, argue that ambiguity is no longer a prerequisite for application of the doctrine in West Virginia.

In West Virginia, "the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488, 495 (W. Va. 1987). Furthermore, "[a]n insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured." *Id.* at 496.

Initially, the doctrine of reasonable expectations was considered a canon of construction and thus applied only to ambiguous insurance contracts. *Id.* The language of an insurance policy provision is considered ambiguous when it is reasonably susceptible to two different meanings, or reasonable minds might be uncertain or disagree as to its meaning. *Riffe v. Home Finders Assoc., Inc.*, 517 S.E.2d 313, 318 (W. Va. 1999). In the present case, Lignetics does not contend that the employers' liability exclusion in its policy is ambiguous, and, indeed, examination of the provision makes plain that it excludes coverage for injuries like those suffered by the Persingers and Boggess. Therefore, as a matter of law, the disputed provision is clear and unambiguous.

Despite that, the doctrine of reasonable expectations may apply to this case due to a line of cases in West Virginia extending the doctrine beyond circumstances involving ambiguous policy language. In *Romano v. New England Mut. Life Ins. Co.*, 362 S.E.2d 334 (W. Va. 1987), West Virginia's highest court refused to apply a policy exclusion when promotional materials provided to the insured did not alert him to the exclusion and, on the contrary, led him to a reasonable belief that he was covered under the policy. *Id.* at 340.

The court has also applied the doctrine to situations involving misconceptions about the coverage that had been sold. In the seminal case of *Keller v. First Nat'l Bank*, 403 S.E.2d 424 (W. Va. 1991), the court held that, after a bank's offer to insure had been accepted with consideration, the bank had created an expectation of credit life insurance in the insured even though the bank's offer to insure had been made by mistake. *Id.* at 429. As a result, the bank could not deny coverage after it failed to adequately notify the insured that its offer of insurance was erroneous. *Id.* When discussing the holding in *Keller* in a subsequent opinion, the court stated that "procedures which foster a misconception about the insurance to be purchased may be considered with regard to the doctrine of reasonable expectation of insurance." *Costello v. Costello*, 465 S.E.2d 620, 623-24 (W. Va. 1995) (per curiam) (finding that an insurance agent's conduct may have created a reasonable expectation of insurance, and noting that *Keller* expanded the doctrine of reasonable expectations beyond circumstances involving ambiguous policy language).

In *Burlington Ins. Co. v. Shipp*, 2000 WL 620307, at *1 (4th Cir. May 15, 2000) (unpublished) (per curiam)[4], a panel of the

[4]Pursuant to Fourth Circuit Local Rule 36(c), unpublished opinions are not binding as precedent and citation of unpublished opinions is disfavored. Nevertheless, Rule 36(c) does not prohibit the citation of unpublished opinions.

Fourth Circuit considered an insurance dispute arising in West Virginia. After review of both *Romano* and *Keller*, the panel concluded that, in West Virginia, "an insured may have a reasonable expectation of insurance coverage when the policy provision on which a denial of coverage is based, although clear and unambiguous, was never communicated to the insured." Id. at *3. The district court had found that the insurer had relied on a clear and unambiguous exclusion when denying coverage. The panel however, concluded that the insured could rely on the doctrine of reasonable expectations to establish coverage where she had been assured of coverage and the exclusion had not been brought to her attention. *Id.* at *2, *4. In particular, it concluded that "[the insured's] reasonable expectation of coverage could not be negated as a matter of law by a clear and unambiguous policy exclusion that was never communicated to her." *Id.* at *4.

Although *Burlington* is an unpublished decision, it suggests that, under West Virginia law, the reasonable expectation doctrine applies in situations similar to the one under review here. Admittedly, Lignetics did not seek specific assurances that it had employers' liability coverage, and any assurances United Agencies

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In the case at bar, the court is not citing *Burlington* as precedent, but only for its well-reasoned distillation of West Virginia insurance law. The Court has attached a copy of *Burlington* to this Order.

provided were general and unspecific. Nevertheless, as the majority in *Burlington* concluded, the reasonable expectation doctrine may apply when an exclusion is not communicated to the insured. In light of that reasoning, whether Lignetics was reasonable in relying on United Agencies' assurance is a question of fact that does not prevent operation of the doctrine.

American Equity urges the Court to disregard the reasoning in *Burlington* because it is an unpublished and, in American Equity's opinion, wrongly decided case. It directs the Court to the dissent in *Burlington,* which concludes that an insurer can rely on a clear and unambiguous exclusion when an agent's assurances are general and unspecified. *Burlington*, 2000 WL 620307, at *7 (Niemeyer, J., dissenting). American Equity argues that the dissent properly interprets the law, and predicts that, if the majority's opinion is indeed the law, it will adversely impact the insurance industry because insurers will not be able to bind coverage for an insured prior to issuance of the policy.

The majority's response to the dissent explains that its decision only upheld a jury's finding that a reasonable expectation of insurance existed under the particular circumstances of the case, and it did not decide that there is always a reasonable expectation of coverage, as a matter of law, whenever an exclusion

is not communicated to an insured. *Burlington*, 2000 WL 620307, at *4, n.2.

Despite American Equity's and United Agencies' arguments to the contrary, in West Virginia, ambiguity is no longer a prerequisite for application of the doctrine of reasonable expectations. Both *Romano* and *Keller* establish that the doctrine may apply in situations where an insurer attempts to deny coverage based on an exclusion that was not communicated to the insured, or where there is a misconception about the insurance purchased.

Accordingly, this Court concludes as a matter of law that the doctrine of reasonable expectations applies to this case and that there are factual questions related to this issue that preclude disposing of the case on the motions of United Agencies and American Equity. Therefore, it **DENIES** United Agencies' and American Equity's motions for summary judgment as they relate to this issue.

C.

Lignetics' Expectation of Insurance

Even if the doctrine of reasonable expectation applies to this case, both American Equity and United Agencies contend that Lignetics was unreasonable in believing it was insured against the type of injuries the Persingers and Boggess allegedly suffered.

Under the doctrine, an insured's belief that it has insurance must be *objectively* reasonable. *McMahon*, 356 S.E.2d at 495.

In this case, American Equity and United Agencies both argue that Lignetics' belief regarding coverage was unreasonable. They base this on the fact that, for several years, Lignetics had operated under similar insurance policies that included employers' liability exclusions, and, thus, was familiar with this type of insurance. Moreover, Lignetics had previously obtained its own workers' compensation insurance for its other plants without the assistance of United Agencies. Finally, United Agencies claims that it did nothing that would lead Lignetics to believe it was obtaining employers' liability insurance for Lignetics.

Lignetics and the Persingers contend that Lignetics reasonably believed it was insured against accidents like the kind suffered by Persinger and Boggess because no one had brought the employers' liability exclusion to its attention. Although Lignetics admits it never read its prior policies containing similar employers' liability exclusionary language, it claims to have asked United Agencies to provide it with "all possible coverages for all possible contingencies." In support of these arguments, Lignetics points to the testimony of Gary Conkey, United Agencies' agent, who admitted during deposition testimony that he had erred first in not

recommending that Lignetics purchase employers' liability insurance and, second, in assuming Lignetics had purchased such coverage on its own.

In *Keller*, the West Virginia Supreme Court noted that "action[s] based on a reasonable expectation of insurance usually will raise substantial questions of fact." 403 S.E.2d at 428. The competing allegations made by the parties in the present case bear out this general rule; despite their motions, the parties have failed to eliminate several genuine issues of material fact. In particular, at this stage, the Persingers have not established that Lignetics was objectively reasonable when it failed to read its past insurance policies, failed to educate itself about employers' liability exclusions, and relied on United Agencies to procure for it all necessary insurance. Nor have United Agencies and American Equity established that Lignetics was unreasonable, as a matter of law, in believing that it had insurance to cover accidents occurring to its employees in the course of their employment.

These questions of fact are significant and need further development at trial. Therefore, the Court **DENIES** the parties' competing motions for summary judgment on the issue of Lignetics' reasonable expectation of insurance.

D.

Agency

Because a question of fact exists as to whether Lignetics may have been objectively reasonable, although mistaken, in believing it was insured against the type of accident the Persingers and Boggess suffered, the next, and perhaps the more difficult question, in this case becomes who might be liable for Lignetics' mistaken belief. The key issue is whether United Agencies was acting as an agent for American Equity when it procured insurance for Lignetics. If it was, then any negligence by United Agencies could be imputed to American Equity.

Section 33-12-22 of the West Virginia Code specifically establishes that a person who solicits an application for insurance is the agent of the insurer, not the insured. *See also Benson v. Cont'l Ins. Co.*, 120 F. Supp. 2d 593, 595 (S.D. W. Va. 2000); *Smithson v. United States Fid. & Guar. Co.*, 411 S.E.2d 850, 859 (W. Va. 1991) (citing *Knapp v. Independence Life Acc. Ins. Co.*, 118 S.E.2d 631, 635 (W. Va. 1961), for the proposition that "the solicitor of the application for insurance should be regarded for all purposes as the agent of the insurer in any controversy between it and the insured or his beneficiary").

American Equity, a surplus lines carrier, argues that United Agencies is not its agent because American Equity did not have any direct contact with anyone from United Agencies. Indeed, United Agencies placed Lignetics' application for insurance with American Equity through Western Security Surplus, a surplus lines broker that served as an intermediary between United Agencies and American Equity. American Equity recognizes that § 33-12-22 statutorily defines an insurance agent as the agent of the insurer rather than the insured, but argues that this statute, and the cases interpreting it, only apply to the relationship between an insurance agent and a standard lines carrier, not a surplus lines carrier.

American Equity's argument is supported by the introductory section of Article 33, which states that "[t]his article does not apply to excess line and surplus line agents and brokers ...." W. Va. Code § 33-12-1. The West Virginia legislature's choice of language in this section of the insurance statute suggests that it recognized a difference between the standard insurance industry and the specialized market of surplus insurance. As such, § 33-12-22 does not conclusively answer the agency question presented in this case.

Turning to the case law, West Virginia's courts have not considered the issue of agency in the surplus lines carrier context. A number of courts from other states have addressed the question, however. In *Carolina Casualty Ins. Co. v. Miss Deanna's Child Care-Med Net, L.L.C.*, - So.2d --, 2003 WL 21674195, *1-*2 (Ala. Civ. App. July 18, 2003), the insured, Med Net, brought an action against a surplus lines automobile insurer, Carolina Casualty Insurance Company ("CCIC"), after CCIC refused to defend and indemnify Med Net when it was named the defendant in a negligence action.

The Alabama court described the relationship between Med Net and CCIC and explained that Med Net had obtained its surplus lines policy through an independent insurance agency which, in turn, had secured coverage from CCIC through an intermediary insurance broker with authority to bind CCIC. *Id.* at *1. The insurance agency had no direct dealings with CCIC. *Id.*

The court found no evidence that CCIC, the surplus lines insurer, appointed the insurance agent to negotiate insurance contracts on its behalf. *Id.* at *5. Furthermore, the agent testified that she had no contractual relationship with CCIC and she had no binding authority with respect to it. *Id.* Moreover, the agent testified that she could have placed Med Net's coverage

with any insurer with which her agency had a relationship. *Id.* Based on this evidence, the court concluded that the insurance agent acted as a broker on behalf of Med Net and not as an employee of CCIC. *Id.* Consequently, the court concluded that the independent insurance agency had neither actual nor apparent authority to act on behalf of CCIC. *Id.* at *6.

The Connecticut Supreme Court faced a similar question in *Hallas v. Boehmke and Dobosz, Inc.*, 686 A.2d 491, 493 (Conn. 1997), where it examined an excess lines insurer's liability for a broker's negligence. In *Hallas*, the insured requested excess lines insurance coverage from an insurance agent, Dobosz, who forwarded his application to an excess lines insurance broker, who in turn forwarded the application to an agent of the excess lines insurer, Scottsdale Insurance Company ("Scottsdale"). *Id.* at 494. Scottsdale's agent then bound coverage on behalf of Scottsdale. *Id.*

After suffering a fire loss, Hallas brought an action against Scottsdale to recover for Dobosz's negligence in obtaining the insurance. *Id.* The court concluded that there was no evidence to establish an agency relationship between Dobosz and Scottsdale, *id.* at 499, explaining that Dobosz had testified he had no authority to bind Scottsdale. Hallas was aware that Dobosz could not himself

issue the policy Hallas sought, and consequently had arranged the insurance, not from Scottsdale directly, but through an excess lines insurance broker. *Id.* Under these circumstances, "no reasonable juror could find actual or implied agency ...."[5] *Id.*

In West Virginia, the Supreme Court of Appeals has defined an agent as "a representative of his principal in business or contractual relations with third persons ...." *Teter v. Old Colony Co.*, 441 S.E.2d 728, 736 (W. Va. 1994) (quoted authority omitted). The court explained that "[a] principal is bound by acts of an agent if those acts are either within the authority the principal has actually given his agent, or within the apparent authority that the principal has knowingly permitted the agent to assume." *Thompson v. Stuckey*, 300 S.E.2d 295, 299 (W. Va. 1983) (citation omitted).

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[5] United Agencies has directed the Court to a number of cases holding that insurance agents are generally considered to be the agents of insurers and not insureds. These cases are materially distinguishable from the present situation, however, because they involved standard lines insurance carriers rather than the specialized market of surplus lines insurance.

For its part, American Equity had directed the Court to *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1998) and *International Surplus Lines Ins. Co. v. Marsh & McLennan, Inc.*, 838 F.2d 124 (4th Cir. 1988). Although *Kapiloff* and *Marsh & McLennan* involved surplus lines insurers, they too are distinguishable because they analyzed the relationship between surplus lines brokers (a position occupied in this case by Western Security Surplus) and surplus lines insurers. *Kapiloff*, 155 F.3d at 491, 498; *Marsh & McLennan*, 838 F.2d at 125, 127.

West Virginia's highest court has further explained that "one of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent." *Teter*, 441 S.E.2d at 736 (citing 3 Am. Jur. 2d, *Agency* § 2 (1986)). To establish an agency relationship, therefore, requires the "manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Syl. Pt. 3, *Cole v. Fairchild*, 482 S.E.2d 913, 923 (W. Va. 1996) (citing *Restatement (Second) of Agency* § 1 (1957)).

"In addition to actual authority, an agent can bind a principal based on apparent authority ...." *Clint Hurt & Assocs., Inc. v. Rare Earth Energy, Inc.*, 480 S.E.2d 529, 536 (W. Va. 1996). To establish apparent authority, the following three elements must be shown:

> (1) [T]hat the principal has manifested his consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

Id. (quoting 3 Am. Jr. 2d, *Agency* § 80 (1986)).

In the present case, there is no evidence that American Equity appointed United Agencies to "solicit, negotiate, effectuate, issue or countersign insurance contracts on behalf of [American Equity]." *Carolina Casualty*, 2003 WL 21674195 at *5. Indeed, Gary Conkey, the United Agencies' agent primarily responsible for Lignetics' coverage, testified at his deposition that he had no direct dealings with American Equity, that neither he nor United Agencies had any agency contract with American Equity, and that neither he nor United Agencies had any binding authority on behalf of American Equity. Conkey further testified that United Agencies was required to go through a broker to obtain a quote from American Equity because United Agencies did not have "an excess surplus license."

Like the insurance agencies in *Carolina Casualty* and *Hallas*, United Agencies placed Lignetics' policy through a surplus lines broker serving as an intermediary between it and the insurer. United Agencies had no direct contact with American Equity; indeed, by law, it could not. In addition, like the agents in *Carolina Casualty* and *Hallas*, United Agencies' agents had no binding authority on behalf of American Equity.

Moreover, there was no "manifestation of consent" by American Equity that United Agencies could act on its behalf, nor was there any suggestion that American Equity exercised control over United

Agencies--both prerequisites for an agency relationship under West Virginia law. Furthermore, nothing in the record of this case suggests that American Equity knowingly permitted United Agencies to act as if it had binding authority on American Equity's behalf. Consequently, United Agencies lacked apparent authority to bind American Equity.

Having determined that United Agencies had neither actual nor apparent authority to act on American Equity's behalf, the Court concludes that any negligence on the part of United Agencies cannot be imputed to American Equity. It, therefore, **DENIES** United Agencies' motion for summary judgment and **GRANTS** American Equity's motion for summary judgment as they relate to this issue.

E.

Oral or Implied Contract of Insurance

Lignetics claims it had an oral or implied contract of insurance with United Agencies that provided coverage for the injuries to the Persingers and Boggess. In West Virginia, "[t]he fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement." *Hart v. Nat'l Collegiate Athletic Assoc.*, 550 S.E.2d 79, 86 (W. Va. 2001)

(per curiam) (citations omitted). "An implied contract 'presupposes an obligation arising from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words.'" *Id.* (citations omitted).

In the field of insurance law, the West Virginia Supreme Court of Appeals has explained that "[a]n insurance contract, similar to other contracts, 'is an offer and acceptance supported by consideration.'" *Keller*, 403 S.E.2d at 427. "The application for insurance is the offer, which the insurer then decides to accept, reject or modify. The insurer then issues a policy or certificate of insurance that evidences the insurance contract." *Id.*

In the present case, Lignetics claims it made an offer to procure insurance to United Agencies. United Agencies then transmitted this offer to American Equity, and American Equity accepted the offer when it issued the policy of insurance. Furthermore, Lignetics claims its payment of the premium was consideration supporting the contract of insurance.

A key element of contract formation is missing from Lignetics' characterization of the transaction, however, because a factual question exists as to whether there was mutual assent to the contents of the contract. In particular, as noted earlier, Lignetics contends it believed it was buying "all possible

coverages for all possible contingencies." United Agencies and American Equity, however, argue that such a sweeping expectation of coverage was unreasonable and that they would not have assented to such terms. Lignetics contends that any misunderstanding about the scope of coverage was United Agencies' unilateral mistake and, therefore, cannot void the contract. It is equally plausible, however, that the gap in coverage was created by a mutual, rather than unilateral mistake, and, as a result, the contract is indeed voidable. The scope of coverage, if any, to which the parties agreed is a material question of fact which the Court cannot determine as a matter of law. Therefore, the Court **DENIES** United Agencies' motion for summary judgment on this issue.

V.

CONCLUSION

For the preceding reasons, the Court:

DENIES American Equity's motion to sever and stay Lignetics' third-party complaint (dkt. no. 78);

DENIES the Persingers' motion for summary judgment (dkt. no. 51);

DENIES United Agencies' motion for summary judgment (dkt. no. 52); and

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ORDER

DENIES IN PART and **GRANTS IN PART** American Equity's motion for summary judgment (dkt. no. 53).

The Court further **DIRECTS** the parties to submit a proposed scheduling order governing further preparation of this case within **30 days** upon entry of this Order.

It is so **ORDERED.**

The Clerk is directed to mail copies of this order to counsel of record.

DATED: September 25, 2003.

Irene M. Keeley

IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE

215 F.3d 1317 (Table)
Unpublished Disposition

(Cite as: 215 F.3d 1317, 2000 WL 620307 (4th Cir.(W.Va.)))

Briefs and Other Related Documents

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

The BURLINGTON INSURANCE COMPANY,
Plaintiff-Appellant,
v.
Mildred R. SHIPP, d/b/a New Sunnyside Tavern,
Defendant-Appellee,
and
Robert A. Morris; Patricia M. Morris, Parties in Interest.

No. 98-2722.

Argued Jan. 24, 2000.
Decided May 15, 2000.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. W. Craig Broadwater, District Judge. (CA-96-10-3).

David Francis Nelson, Schumacher, Francis, Stennett & Nelson, Charleston, WV, for appellant.

Michael Douglas Lorensen, Bowles, Rice, McDavid, Graff & Love, Martinsburg, WV, for appellee.

ON BRIEF: R. Ford Francis, Schumacher, Francis, Stennett & Nelson, Charleston, WV, for appellant. F. Samuel Byrer, Nichols & Skinner, L.C., Charles Town, WV, for appellee.

Before NIEMEYER, Circuit Judge, CHASANOW, United States District Judge for the District of Maryland, sitting by designation, and DAVIS, United States District Judge for the District of Maryland, sitting by designation.

OPINION

PER CURIAM.

**1 Burlington Insurance Company appeals the district court's denial of its motion for judgment as a matter of law following a jury trial on the issue of whether its insured, Mildred Shipp, d/b/a New Sunnyside Tavern, had a reasonable expectation of insurance coverage under her general liability policy for liability arising out of an assault and battery that occurred in her tavern. For the reasons that follow, we affirm.

I

Mildred Shipp owns the New Sunnyside Tavern (the"Tavern") in Marlowe, West Virginia. In late April 1993, Shipp contacted insurance agent Elmo Bennett about obtaining a general liability policy for the Tavern. Bennett called an underwriter at Mountaineer Insurance Group, a licensed insurance broker, to obtain a quotation on a policy for Shipp. The underwriter, Lester Long, took the necessary information from Bennett and generated a quotation for a Burlington Insurance policy.

On May 7, 1993, Shipp went to Bennett's office to complete an application for the policy. Shipp asked Bennett about the scope of her coverage, and Bennett told Shipp she was covered for everything except theft and liability arising out of the drunk driving of a patron. Shipp gave Bennett a premium down payment for the policy and left Bennett's office believing she had insurance for the Tavern. Bennett contacted Mountaineer that same day and advised Long that he had an application and premium down payment from Shipp. On the basis of this information, Long told Bennett he would bind coverage for a policy with Burlington. Mountaineer issued a policy binder on May 7, 1993, and faxed only the first page of the binder to Burlington. Bennett and Shipp were not sent a copy of the binder. Although brokers sometimes note

policy exclusions on binders, Mountaineer did not note any exclusions on Shipp's binder.

On May 14, 1993, Robert Morris was injured at the Tavern when he was assaulted by another patron with a pool cue. Shortly after the incident, Shipp went to Bennett's office and told him about the assault on Morris. Shipp asked Bennett whether she would have any problems with her insurance coverage. Bennett told her the insurance was effective as of the date she made her down payment, May 7, 1993, and that she had nothing to worry about.

Mountaineer did not actually generate Shipp's policy until June 7, 1993. The policy prepared by Mountaineer contained the following assault and battery exclusion:

> It is agreed and understood that this insurance does not apply to bodily injury or property damage arising out of assault and battery or any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation of the insured, his employees, patrons or any other person.

A copy of the policy was sent to Bennett on June 10, 1993. Shipp testified that she never received a copy of the policy and was not otherwise informed of the assault and battery exclusion.

Morris later sued Shipp in the Circuit Court of Berkeley County, West Virginia, for the injuries he sustained in the assault at the Tavern. After she was served with the complaint, Shipp attempted to contact Bennett to notify him of the suit. Bennett, however, had suffered a severely disabling stroke in the meantime, and his office had closed. Through Bennett's wife, Shipp was able to identify Mountaineer, who directed Shipp to Burlington. Relying on the assault and battery exclusion in Shipp's policy, Burlington refused to indemnify or defend Shipp against Morris' claim. Burlington then filed a declaratory judgment action in the United States District Court for the Northern District of West Virginia seeking a determination that it had no duty to indemnify or defend Shipp.

**2 Both Burlington and Shipp filed motions for summary judgment in the district court. At the pre-trial conference held six days before trial, the district court ruled as follows on the parties' motions: (1) the assault and battery exclusion in the insurance policy was clear and unambiguous as a matter of law; (2) the case would proceed to trial on the sole issue of whether Shipp had a reasonable expectation of coverage for assault and battery claims based on her contact with Bennett; and (3) Bennett would be considered Burlington's agent for purposes of the litigation. After the court denied Burlington's motion in limine to preclude Shipp from testifying about statements Bennett made to her regarding policy coverage and exclusions, Burlington sought leave to amend the trial witness list to include Bennett. Following argument by counsel, the court denied Burlington's request.

The case was tried before a jury on February 10-11, 1998. Burlington moved for judgment as a matter of law following the presentation of Shipp's case and at the conclusion of its evidence. The court denied the motions. The jury returned a verdict finding that Shipp had a reasonable expectation of insurance coverage for liability arising out of the assault and battery that occurred in the Tavern. Burlington filed a timely motion pursuant to Federal Rule of Civil Procedure 50(b) for judgment as a matter of law or, in the alternative, for a new trial, which the court denied. Burlington's Rule 50(b) motion raised the following arguments, which are now before this court on appeal: (1) the district court erred in permitting Shipp to rely on the doctrine of reasonable expectations to establish coverage when the insurance policy clearly and unambiguously excluded coverage for the type of loss claimed by Shipp; (2) the district court abused its discretion in denying Burlington's request to call Bennett as a witness; and (3) the district court erred in ruling that Bennett was Burlington's agent as a matter of law.

II

We first address Burlington's argument that the district court erred in allowing the jury to find a reasonable expectation of insurance coverage when the court had already ruled that the policy exclusion for assault and battery claims was clear and unambiguous. Burlington contends that the doctrine of reasonable expectations is a principle of

construction that applies only when the insurance contract is ambiguous. We review the district court's denial of Burlington's Rule 50(b) motion for judgment as a matter of law de novo, viewing the evidence in the light most favorable to the prevailing party and drawing all reasonable inferences in her favor. *Konkel v. Bob Evans Farms, Inc.,* 165 F.3d 275, 279 (4th Cir.), *cert. denied,* 120 S.Ct. 184 (1999).

In West Virginia, "the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *National Mut. Ins. Co. v. McMahon & Sons, Inc.,* 356 S.E.2d 488, 495 (W.Va.1987). The doctrine of reasonable expectations places the burden on the insurer to communicate coverage and exclusions of a policy to the insured accurately and clearly. *See id.* at 496 ("An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured." (citations omitted)). Generally, an insured cannot have an objectively reasonable expectation of coverage when his policy clearly and unambiguously excludes coverage. *See Soliva v. Shand, Morahan & Co.,* 345 S.E.2d 33, 36 (W.Va.1986). The doctrine of reasonable expecta-tions, therefore, is ordinarily limited to those instances in which the policy language is ambiguous. *McMahon,* 356 S.E.2d at 496. The West Virginia Supreme Court of Appeals, however, has extended the doctrine beyond circumstances involving ambiguous policy language.

**3 An insured may have a reasonable expectation of insurance coverage when the policy provision on which a denial of coverage is based, although clear and unambiguous, was never communicated to the insured. The West Virginia Supreme Court of Appeals refused to apply an uncommunicated policy exclusion in *Romano v. New England Mutual Life Insurance Co.,* 362 S.E.2d 334 (W.Va.1987). In *Romano,* Mr. Romano enrolled in a group life insurance plan through a local insurance agent. The promotional materials provided to Mr. Romano stated that "[a]ll employees who work 30 hours or more a week are covered under the program" and that the policy was effective as of July 1, 1978. *Id.* at 336. There was no mention of policy conditions or additional requirements for eligibility.

Mr. Romano was hospitalized for a myocardial infarction on June 26, 1978, and died on July 2, 1978, one day after the master policy became effective. Mr. Romano was not provided with a copy of the master policy or a certificate of insurance prior to his death. The insurer told Mr. Romano's son that coverage was unavailable for Mr. Romano under the group life policy because he was not "actively at work" on July 1, 1978, a condition precedent to coverage under the policy. Mr. Romano's son later discovered that the"actively at work" condition was not included in the materials given to his father when he purchased the policy, and sued for coverage. The court held that the "actively at work" condition stated in the master policy would not bar coverage. The court stated:

> The only eligibility requirement to which Mr. Romano was specifically alerted by the materials was full-time employment status. We believe the materials issued by New England were such as to lead Mr. Romano to a reasonable and honest belief that he was covered under the policy. It would, we believe, be inequitable to permit New England to enforce the more onerous policy condition where previous communications with the insured suggested its nonexistence.

Id. at 340.

The court reached a similar conclusion in *Keller v. First National Bank,* 403 S.E.2d 424 (W.Va.1991). In *Keller,* Mrs. Keller purchased credit life insurance in connection with a loan she obtained from First National Bank. The note for the loan and the credit life insurance were subsequently renewed by the bank. Mrs. Keller initialed the renewal note to accept the insurance coverage. The note contained a $150 charge for the insurance. Mrs. Keller's health had deteriorated since the initial policy period, however, and the credit life insurance was renewed in error. Although the bank then canceled the charge for the insurance, the bank did

not notify the Kellers in writing that the life insurance would not be issued or that the insurance charge had been deducted from the principal financed. The monthly payments required by the renewal note remained the same, and the Kellers were not given a new renewal note.

**4 Mrs. Keller died during the term of the renewal note. The insurer refused to pay any insurance benefits, claiming that no insurance was in effect when Mrs. Keller died. The court disagreed, holding that:

> Most people expect insurance once they pay the premium, but in the present case, even though the premium was paid, insurance was denied. In order to eliminate an insured's doubt about coverage, we find that once an insurer creates a reasonable expectation of insurance coverage, the insurer must give the coverage or promptly notify the insured of the denial.... Under this rule, once an insurer creates a reasonable expectation of insurance coverage, the insured is assured of coverage or a prompt notice of denial, which would give the insured the opportunity to seek other ways of limiting the risk.

Id. at 427. [FN1]

> FN1. Burlington's reliance on *Robertson v. Fowler,* 475 S.E.2d 116 (W.Va.1996), is misplaced. *Robertson* did not involve an uncommunicated exclusion or condition of coverage and is therefore inapposite.

In this case, Shipp inquired as to the scope of her coverage when she applied for the Burlington policy. Bennett told her she was covered for everything except theft and drunk driving. After the incident in which Morris was injured, Shipp went to Bennett to make sure she was covered, and Bennett told her not to worry because the incident was covered by her policy. Shipp's policy containing the assault and battery exclusion was generated more than three weeks after Morris was injured in the Tavern, and the policy was never sent to Shipp. Bennett's representations to Shipp were sufficient to create a reasonable expectation of coverage. *Romano* and *Keller* make clear that Shipp's reasonable expectation of coverage could not be negated as a matter of law by a clear and unambiguous policy exclusion that was never communicated to her. [FN2] Thus, we find that the district court did not err in permitting Shipp to rely on the doctrine of reasonable expectations to establish coverage for Morris' claim against her.

> FN2. The dissent's conclusion that Shipp could not, as a matter of law, have a reasonable expectation of coverage is based on the premise that the assault and battery exclusion is a so-called"standard" policy exclusion. The evidence before the jury, however, was conflicting on precisely that point. Prior to trial, the court denied Shipp's motion in limine to prevent Burlington from introducing testimony about the exclusion. Joint App. at 135, 432. The colloquy indicated that both parties, and the court, were treating the matter as one of evidence for the jury to consider in resolving the reasonable expectations issue. At trial, the testimony of witnesses for both sides touched on the issue, with it being uncontradicted that Shipp's immediately preceding standard line policy from American States did not exclude assault and battery coverage. Joint App. at 310-17. Thus, while it might be Burlington's "standard" exclusion, and indeed standard in many excess line policies, it was possible for the jury to have found that the exclusion was not "standard" in Shipp's experience or in the insurance industry as a whole.
>
> The dissent also suggests that affirmance in this case is "judicially irresponsible" because we are creating insurance coverage based on general assurances that were contrary to the terms of the written policy. It must be remembered, however, that we are only upholding the jury's determination that Shipp had a reasonable expectation of coverage, and not deciding as a matter of law that there will always be coverage under the circumstances presented here. Based on all of the evidence before it, the jury concluded, as a matter of fact, that Shipp had a reasonable

> expectation of coverage for the incident at the Tavern despite the assault and battery exclusion in the undelivered policy. Neither the trial jury, nor this court, had before it any issue with regard to other"standard" exclusions for nuclear disaster or pollution damage. Under the circumstances of this case, it was for the jury and not the court to decide whether Shipp was entitled to coverage.

III

Burlington next argues that the district court erred in barring Burlington from calling Bennett as a trial witness. Burlington did not list Bennett in the joint pre-trial order, but sought to add him as a witness six days before trial after the court ruled that Shipp could testify about statements Bennett made to her regarding policy coverage and exclusions.

Federal Rule of Civil Procedure 26(a)(3)(A) requires that a party disclose to other parties the name, address and telephone number of each witness it (1) expects to call at trial and (2) may call if the need arises. Unless otherwise directed by the court, this disclosure must be made at least thirty days before trial. *Id.* A party who without substan-tial justification fails to disclose information in compliance with Rule 26(a) "shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed.R.Civ.P. 37(c)(1). "The determination of whether a Rule 26(a) violation is [substantially] justified or harmless is entrusted to the broad discretion of the district court." *Mid-America Tablewares, Inc. v. Mogi Trading Co.,* 100 F.3d 1353, 1363 (7th Cir.1996); *see Adalman v. Baker, Watts & Co.,* 807 F.2d 359, 369 (4th Cir.1986). In exercising that discretion, a district court is guided by the following factors: (1) the surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the explanation for the party's failure to name the witness before trial; and (5) the importance of the testimony. *Adalman,* 807 F.2d at 369; *see also Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.,* 170 F.3d 985, 993 (10th Cir.1999) (listing similar factors to be considered by trial court under Rule 37(c)(1)); *United States v.. $9,041,598.68,* 163 F.3d 238, 252 (5th Cir.1998) (same).

****5** Burlington knew as early as September 1996 that Shipp was relying on Bennett's representations about policy exclusions to establish her right to coverage for Morris' claim, and thus knew of Bennett's importance as a witness. Burlington claims that at the time the joint pre-trial order was submitted to the court, it had information that Bennett was incompetent or that taking his deposition would pose a health risk. Through additional investigation conducted after the joint pre-trial order was filed, Burlington learned that Bennett was able to understand and answer "yes or no" questions, and remembered issuing a policy to Shipp and explaining the policy exclusions to her. Burlington then sought to add Bennett as a witness when the court denied Burlington's motion in limine and ruled that Shipp could testify about statements Bennett made to her regarding policy exclusions. Burlington does not explain, however, why it could not have listed Bennett as a witness when the pre-trial order was filed and simply not called him as a witness if he was later determined to be incompetent. Furthermore, hoping that Bennett's testimony would not be needed because the court would grant Burlington's motion in limine to preclude testimony about statements Bennett made to Shipp is not a sufficient explanation for failing to name a witness before trial. Thus, there was not substantial justification for Burlington's failure to list Bennett as a witness, and Burlington could call Bennett only if the district court found that the failure to disclose was harmless.

At the pre-trial conference, the district judge discussed the potential impact of adding Bennett as a witness less than a week before trial:

> The case now becomes almost a trial within a trial about his competency, taking the deposition, perhaps even throwing it back to the Shipp side of the case to run and scramble and get somebody to say whether or not he was medically able to give opinions and just all of the other things I know about a stroke victim. That is the big problem here. And then how do you weigh the

type of testimony that would have to be drawn from him by giving him these, we are going to have to admit, fairly technical and perhaps even legal type questions and having him answer in the yes or no.

Thus, the district court found that permitting Bennett to testify would have unduly disrupted the trial, as well as Shipp's pre-trial preparation, while yielding testimony that would be marginally useful to the finder of fact. Based on these findings, we conclude that the district court did not abuse its discretion in refusing to allow Burlington to add Bennett as a witness six days before trial. [FN3]

FN3. We note that the district court also had the discretion to deny Burlington's request to add Bennett as a witness because of the threat to his health. The court referred to information provided by Bennett's doctor that Bennett had "apparently significant loss of speech [and] right side loss of motor functions," and that interviewing him or taking his deposi- tion "would cause an emotional state that would probably put him at risk of medical problems."

IV

Burlington's final argument is that the district court erred in ruling that Bennett was Burlington's agent as a matter of law. The district court's ruling was based on West Virginia Code § 33-12-23, which provides:

Any person who shall solicit within this State an application for insurance shall, in any controversy between the insured or his beneficiary and the insurer issuing any policy upon such application, be regarded as the agent of the insurer and not the agent of the insured.

**6 W.VA.CODE § 33-12-23 (1996). Burlington does not dispute that Bennett solicited an application for insurance from Shipp. Burlington contends, however, that § 33-12-23 was not intended to apply to Bennett and Burlington in this case.

Burlington argues that to understand the intended scope of § 33-12-23, it must be read in conjunction with accompanying code sections' relating to insurance agents, brokers, solicitors and excess line carriers. Relying on other code sections, Burlington argues that an insurance agent must be appointed as an agent by an insurer to be "regarded as the agent of the insurer" under § 33-12-23. [FN4] Because Bennett was never appointed as Burlington's agent, Burlington claims that Bennett cannot be considered Burlington's agent under § 33-12-23.

FN4. Burlington relies principally on West Virginia Code § 33-12- 19, which provides, in pertinent part:
(a) An agent may not accept any risk, place any insurance or issue any policy except with an insurer licensed in this state and for which insurer such agent has been appointed and licensed.
(b) An agent may not accept any contract of insurance from any broker not licensed in this state.
(c) An agent may not employ or accept services of any solicitor not duly appointed and licensed as solicitor for such agent.
(d) An agent may not solicit, market, sell or transact any business of any kind on behalf of any insurer until after the agent has been appointed as agent for that insurer pursuant to the provisions of this article and such appointment has been approved by the commissioner of insurance.
...
Burlington also cites sections 33-12-10 and 33-12-13, which relate to excess line insurance and the licensing of excess line brokers.

Burlington's argument is based on the principle of statutory construction under which "statutes [that] relate to the same subject matter should be read and applied together, i.e., *in pari materia,* so that the Legislature's intention can be gathered from the whole of the enactments." *Smith v. State Workmen's Compensation Comm'r,* 219 S.E.2d 361, 365 (W.Va.1975). The rule of *in pari materia,* however,

is applied only to resolve an ambiguity in a statute. *Kimes v. Bechtold,* 342 S.E.2d 147, 150 (W.Va.1986) ("This *in pari materia* rule of statutory construction applies, of course, only when the particular statute is ambiguous."). Section 33-12-23 is clear and unambiguous, *Knapp v. Independence Life & Acc. Ins. Co.,* 118 S.E.2d 631, 635 (W.Va.1961), and provides that "*any* person who shall solicit ... an application for insurance shall ... be regarded as the agent of the insurer," W.Va.Code § 33-12-23 (emphasis added). It is undisputed that Bennett solicited an application from Shipp for a Burlington insurance policy. Nothing more is required to bring Bennett and Burlington within the operation of § 33-12-23. *See Knapp,* 118 S.E.2d at 635 ("It is obvious from the clear and unambiguous language of the statute that the solicitor of the application for insurance should be regarded for all purposes as the agent of the insurer in any controversy between it and the beneficiary."); *see also Smithson v. United States Fidelity & Guar. Co.,* 411 S.E.2d 850, 858-59 (W.Va.1991). Thus, we find no error in the district court's application of the statute in this case.

V

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

NIEMEYER, Circuit Judge, dissenting:

The majority as well as the parties agree in this case that Mildred Shipp's insurance policy contained a provision that excluded coverage for her liability arising from assaults among patrons of her tavern. This was a standard assault- and-battery exclusion included in the form of the policy. Yet the majority affirms coverage based on the general statements made to Shipp by her insurance agent that her policy from Burlington Insurance Company covered everything except theft and liability arising out of the drunk driving of a patron. The majority thus would leave standing a finding that impermissibly construes the agent's statement that everything was covered to provide Shipp with coverage for assaults--and presumably anything else--notwithstanding the policy's language, because Shipp could have a reasonable expectation of coverage for "everything."

**7 Burlington's policy has, in addition to the standard exclusion for assault and battery, other exclusions such as those for nuclear disaster, for liability assumed by contract, for worker's compensation risks, for pollution damage, and others. If the agent's representation that everything was covered includes all conceivable risks, the premiums would have to exceed the value of Shipp's business itself.

To avoid the absurdity of such a position, Shipp argues in her brief that she and the insurance agent understood coverage to be that of "a general liability policy." Appellee's brief at 2. But this argument fails to provide the basis for distinguishing nuclear-disaster and pollution-damage exclusions--exclusions which Shipp's counsel agreed, at oral argument, would apply--from the assault- and-battery exclusion. Each was a standard exclusion to "a general liability policy."

It is, I respectfully suggest, judicially irresponsible to leave standing a finding of insurance coverage on so generalized an assurance as that which was provided here. It is even more remarkable when one recognizes that the insurance agent who made the general statements about coverage was an independent agent and not an employee of Burlington Insurance Company. I would conclude that we must construe the policy's coverage in accordance with its written terms and that general and unspecified assurances by an independent agent cannot, as a matter of law, modify those specific written terms, even under a liberal application of West Virginia's doctrine of reasonable expectations. Therefore, I would reverse.

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Briefs and Other Related Documents (Back to top)

• 1999 WL 33614115 (Appellate Brief) Reply Brief of Appellant (Apr. 19, 1999)

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- 1999 WL 33614114 (Appellate Brief) Brief of Appellee (Apr. 01, 1999)

- 1998 WL 34082665 (Appellate Brief) Brief of Appellant (Feb. 17, 1998)

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